Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States
October Term, 1995

KENNETH W. MCGILL,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

Petition For Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. In the face of conflicting circuit courts, it is unclear whether a convicted felon may have the district court review and render a decision as to whether his firearms disabilities should be removed since the Bureau of Alcohol, Tobacco and Firearms is no longer able to process a convicted felon's application for removal of Federal firearms

STATEMENT PURSUANT TO RULES 14.1(b) and 29.1

With the exception of the Solicitor General, all parties are named in the caption.

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INTRODUCTORY PRAYER

Appellant Kenneth W. McGill pray this Court to grant his petition for certiorari to review an adverse decision by the United States Court of Appeals for the Fifth Circuit.

CITATION TO OPINION BELOW

The Decision of the United States Court of Appeals for the Fifth Circuit is reported at 74 F.3d 64 (5th Cir. 1996) (see Appendix 1a-9a).

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1254 because appellant seeks review of an adverse decision rendered by the United States Court of Appeals for the Fifth Circuit.

STATUTORY PROVISIONS INVOLVED

1. Title 18 U.S.C. §922(g)(1).

It shall be unlawful for any person who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition, or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

2. 18 U.S.C. §925(c).

A person who has been convicted of a crime punishable by imprisonment for a term exceeding one year (other than a crime involving the use of a firearm or other weapon or a violation of this chapter of the National Firearms Act) may make application to the Secretary for relief from the disabilities imposed by Federal laws with respect to the acquisition, receipt, transfer, shipment, or possession of firearms and incurred by reason of such conviction, and the Secretary may grant such relief if it is established to his satisfaction that the circumstances regarding the conviction, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the

granting of the relief would not be contrary to the public interest. A licensed importer, licensed manufacturer, licensed dealer, or licensed collector conducting operations under this chapter, who makes application for relief from the disabilities incurred under this chapter by reason of such a conviction, shall not be barred by such conviction from further operations under his license pending final action on an application for relief filed pursuant to this section. Whenever the Secretary grants relief to any person pursuant to this section he shall promptly publish in the Federal register notice of such action, together with the reasons therefor.

3. Public Law 102-393 (1992) of the Treasury Department Appropriations Act.

None of the funds appropriated shall be available to investigate or act upon applications for relief from Federal Firearms Disabilities under 18 U.S.C. §925(c)

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in Court Below

This appeal arises from the court of appeal's affirmance of the district court's denial of Defendant and Appellant herein, Kenneth W. McGill's, Application for Removal of Federal Firearms Disabilities due to the district court's finding that it did not have jurisdiction to rule on Mr. McGill's Application.

B. Statement of Facts

The Defendant, KENNETH W. McGILL, was sentenced on April 19, 1993. The district court placed the Defendant on probation for a period of two years as a result of his conviction based on a two count indictment, to wit, the making of a false statement pursuant to Title 18 U.S.C. §1014 and the filing of a false tax return pursuant to Title 26 U.S.C. §7206. On September 14, 1994, the Defendant was granted early release from probation, and the district court eliminated all conditions of probation imposed upon Kenneth McGill.

On March 10, 1995, Defendant filed with the district court an Application for Removal of Federal Firearms Disabilities imposed upon him by Title 18 U.S.C. §922(g)(1). The district court set the evidentiary hearing for Defendant's Application for March 27, 1995. On or about March 22, 1995, the United States filed its Government's Response to Defendant's Application for Removal of Federal Firearms Disabilities. The Government's primary argument in the Response was the district court did not have jurisdiction to rule on Kenneth McGill's Application for Removal of Federal Firearms Disabilities.

C. Federal Firearms Law and Regulations

Title 18 U.S.C. §922(g)(1) states "It shall be unlawful for any person who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition, or to receive any firearm or ammunition which has been shipped or transported in

interstate or foreign commerce." However, 18 U.S.C. §925(c) provides:

> A person who has been convicted of a crime punishable by imprisonment for a term exceeding one year (other than a crime involving the use of a firearm or other weapon or a violation of this chapter of the National Firearms Act) may make application to the Secretary for relief from the disabilities imposed by Federal laws with respect to the acquisition, receipt, transfer, shipment, or possession of firearms and incurred by reason of such conviction, and the Secretary may grant such relief if it is established to his satisfaction that the circumstances regarding the conviction, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest. A licensed importer, licensed manufacturer, licensed dealer, or licensed collector conducting operations under this chapter, who makes application for relief from the disabilities incurred under this chapter by reason of such a conviction, shall not be barred by such conviction from further operations under his license pending final action on an application for relief filed pursuant to this section. Whenever the Secretary grants relief to any person pursuant to this section he shall promptly publish in the Federal register notice of

such action, together with the reasons therefor.

The Secretary of the Treasury has delegated to the ATF the task of investigating and determining if an individual should have his firearms disabilities removed.

However, Mr. McGill, through counsel, was specifically informed by the ATF in Washington D.C., and Dallas, Texas, that applications for relief pursuant to 18 U.S.C. §925(c) were no longer being accepted by the ATF. The ATF informed Mr. McGill's counsel that Public Law 102-393 (1992) of the Treasury Department Appropriations Act specifically provides that none of the funds appropriated shall be available to investigate or act upon applications for relief from Federal Firearms Disabilities under 18 U.S.C. §925(c). Therefore, the ATF is no longer accepting applications for relief since Congress has denied funding for that program for the last two years.

The district court made an oral ruling on March 27, 1995 that the district court did not have jurisdiction to rule on Appellant Kenneth McGill's Application for Removal of Federal Firearms Disabilities. A written order entered on June 5, 1995 decreed the district court did not have jurisdiction to rule on Mr. McGill's Application for Removal of Federal Firearms Disabilities.

Appellant, Kenneth W. McGill, then appealed the district court's decision to the United States Court of Appeals for the Fifth Circuit. The appeal was heard on November 8, 1995 and the Appellate Court affirmed the district court's decision in an opinion rendered on January 18, 1996.

REASON FOR GRANTING THE PETITION

IN THE FACE OF CONFLICTING CIRCUIT COURTS, IT IS UNCLEAR WHETHER A CONVICTED FELON MAY HAVE THE DISTRICT COURT REVIEW AND RENDER A DECISION AS TO WHETHER HIS FIREARMS DISABILITIES SHOULD BE REMOVED SINCE THE BUREAU OF ALCOHOL, TOBACCO AND FIREARMS IS NO LONGER ABLE TO PROCESS A CONVICTED FELON'S APPLICATION FOR REMOVAL OF FEDERAL FIREARMS DISABILITIES.

This case came on for hearing before the United States Court of Appeals for the Fifth Circuit on the 8th day of November, 1995. The Fifth Circuit rendered its ruling on January 18, 1996.

On October 18, 1995, the Court of Appeals for the Third Circuit in a case styled Rice v. United States Department of Alcohol, Tobacco and Firearms, 68 F.3d 702, (3d. Cir. 1995) rendered a ruling which is in direct conflict with the present case. In the Rice case, Mr. Rice filed an application for removal of Federal firearms disabilities. He was informed by the Bureau of Alcohol, Tobacco and Firearms (hereinafter referred to as "ATF") that the ATF was no longer processing the applications. Mr. Rice then sought review in the district court. The district court ruled it did not have jurisdiction to rule on the application for removal of Federal firearms disabilities. Mr. Rice appealed the district court ruling to the Third Circuit Court of Appeals. The Court of Appeals ruled the ATF's policy of not reviewing the applications for removal of Federal firearms disabilities made the application by Mr. Rice futile. The Third Circuit held futility is an exception to the exhaustion of remedies doctrine, and

therefore, the district court did have jurisdiction to rule on Mr. Rice's application for removal of Federal firearms disabilities.

However, in the present case, Appellant argued that in most cases, the exhaustion doctrine prevents judicial review unless the plaintiff has exhausted all of his administrative remedies. However, this requirement may be bypassed if the plaintiff's fact situation satisfies any of the exceptions to the exhaustion doctrine. The exceptions are set out in Christopher W. v. Portsmouth School Committee, 877 F.2d 1089, 1094 (5th Cir. 1989) and Hessbrook v. Lennon, 777 F.2d 999, 1003 (5th Cir. 1986) and are as follows:

1. It would be patently futile to use the due process procedures;

2. An agency has adopted a policy or pursued a practice of general applicability that is contrary to the law;

3. It is improbable that adequate relief can be obtained by pursuing administrative remedies (e.g. the hearing officer lacks the authority to grant the relief sought); or

4. Where the available administrative remedies either are unavailable or wholly inappropriate to the relief sought.

The existence of these exceptions to the exhaustion doctrine are further evidenced by the case of Honig v. Doe, 484 U.S. 305, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988). In Honig, the Court emphasized that judicial review is

normally not available until all administrative proceedings are completed; however, the exhaustion doctrine may be bypassed where exhaustion will be futile or inadequate. Honig 484 U.S. at 326, 108 S.Ct. at 606. The Court went on to say that the burden in such cases rests with the party asserting futility or inadequacy of administrative review. Id. In addition, prior to the Honig decision, the Court in McGee v. United States, 402 U.S. 479, 91 S.Ct. 1565, 29 L.Ed.2d 47 (1971) reviewed the exhaustion doctrine as it applied to selective services cases. The Court held the exhaustion doctrine "is not to be applied inflexibly." McGee, 402 U.S. at 483, 91 S.Ct. at 1568.

Appellant further argued that his situation is similar to the situation in the case of Manecke v. School Board of Pinilias County, 762 F.2d 912, 918 (11th Cir. 1985), cert. denied, 474 U.S. 1062, 106 S.Ct. 809, 88 L.Ed. 2d 784 (1986) in which the plaintiff was denied, by the school board, access to the EHA's "carefully tailored administrative and judicial mechanism." The Court ruled in these circumstances, exhaustion of administrative remedies is not required before the district court may take action. Christopher W. 877 F.2d at 1095. Furthermore, in Kerr Center Parents Ass'n v. Charles, 897 F.2d 1463 (9th Cir. 1990), the Court ruled failure to exhaust administrative remedies was not a bar to the actions because resort to the administrative process would have been futile. In Kerr, parents of handicapped children instituted a Federal suit against the school district and individual administrators. The school district had refused to provide a due process hearing and stated they would no longer provide educational services because the state had not appropriated sufficient funds. The Ninth Circuit held plaintiffs were not required to exhaust their administrative remedies because they had already taken all the measures

to secure administrative relief which could reasonably be expected of them, and the state had determined it would not provide the funds necessary for plaintiffs' free appropriate education. Id. at 1470. These cases clearly indicate the district court has jurisdiction in cases where the administrative agency will not abide by the guidelines for reinstatement of an individual's firearms rights. By failing to process the application, the ATF is denying Mr. McGill access to the administrative mechanism. Both the Fifth Circuit and the Supreme Court have held the exhaustion doctrine does not apply in cases where it would be futile to use the due process procedure or when the due process procedure has been denied. Christopher W., 877 F.2d at 1094, Hessbrook 777 F.2d at 1003, Honig 484 U.S. at 326, 108 S.Ct. at 606. In these instances, the district court may take action.

Furthermore, in the Government's Response to Defendant's Application For Removal of Federal Firearms Disabilities, the Government states the effect of The Treasury, Postal Service, and General Appropriations Act, 1993, Pub. L. No. 102-393, 1992 U.S.C.C.A.N. (106 Stat. 1729), is "that all applications for relief from Federal firearms disabilities (or request for such applications) received by ATF on or after October 6, 1992, are returned to the applicant" (emphasis added). The Government further states that the "statute effectively suspends ATF's authority under section 925(c) to grant or deny relief applications during fiscal year 93-94" (emphasis added). By so stating, the Government admitted to the district court that the district court had jurisdiction to rule on Mr. McGill's Application for Removal of Federal Firearms Disabilities as follows:

1. It would be patently futile for Mr. McGill to

even submit an application because the ATF will not review his application; and

2. It is improbable that adequate relief can be obtained by pursuing administrative remedies because the **hearing officer lacks the authority to grant the relief sought.**

Both of the above arguments are exceptions to the exhaustion doctrine. Christopher W., 877 F.2d at 1094, Hessbrook 777 F.2d at 1003, Honig 484 U.S. at 326, 108 S.Ct. at 606. By admitting to their practice of returning applications to the applicant and their lack of authority to grant or deny the relief sought, the Government has admitted that the district court has jurisdiction to review Appellant's Application for Removal of Federal Firearms Disabilities.

With identical arguments placed before the Third Circuit Court of Appeals and the Fifth Circuit Court of Appeals, the Fifth Circuit Court of Appeals entered a ruling which was completely opposite of the Third Circuit ruling. Instead, the Fifth Circuit ruled the district court did not have jurisdiction because Congress had suspended the ability of convicted felons to seek relief from Federal firearms disabilities.

Due to the conflicting rulings by the Third and Fifth Circuits, there currently exists conflicting law as to whether a felon's application for removal of Federal firearms disabilities can be ruled upon by a district court. Therefore, a ruling by the Supreme Court is necessary to clarify the two conflicting rulings of the circuit courts.

This case presents an excellent opportunity for this

Court to make a final determination of whether Public Law 102-393 makes an individual's application to the Bureau of Alcohol, Tobacco and Firearms futile such that the individual is no longer under the exhaustion of administrative remedies doctrine and may seek relief directly in the district court.

CONCLUSION

For the foregoing reasons, Appellant Kenneth W. McGill respectfully requests this Court to grant his petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit.

Respectfully Submitted,

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APPENDICES

APPENDIX A

[Filed January 18, 1996]

UNITED STATES of America, Plaintiff-Appellee,

v.

Kenneth W. McGILL, Defendant-Appellant.

No. 95-10342.

United States Court of Appeals.

Fifth Circuit.

Jan. 18. 1996.

Appeal from the United States District Court for the Northern District of Texas.

Before DAVIS and PARKER, Circuit Judges and BUNTON[1], District Judge.

W. EUGENE DAVIS, Circuit Judge:

McGill, a convicted felon, who lost his right to possess firearms upon his conviction of a felony, appeals from the dismissal of his application to restore his firearms privileges. We affirm the district court's judgment.

Kenneth W. McGill pleaded guilty to two felony offenses: making a false statement pursuant to *18 U.S.C. Sec. 1014* and filing a false tax return pursuant to 26

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1. District Judge of the Western District of Texas, sitting by designation.

U.S.C. Sec. 7206. In April 1993, he was sentenced to probation for two years. The district court granted an early release from probation in September 1994.

Title *18 U.S.C. Sec.* 922(g)(1) prohibits a convicted felon from shipping, transporting, or possessing any firearms or ammunition. Title *18 U.S.C. Sec.* 925(c) permits any person to apply to the Secretary of Treasury for relief from the disabilities imposed under Sec. 922(g)(1). The Secretary has transferred his authority to grant this relief to the Director of the Department of Alcohol, Tobacco and Firearms ("ATF"). *27 C.F.R. Sec. 178*.144.

McGill wrote the ATF requesting information about applying for relief from the Sec. 922 firearm disability. The ATF informed him that it was no longer accepting applications for relief authorized by Sec. 925(c) because Congress had denied funding for the program. Public Law 103-329 (1994) of the Treasury Department Appropriations Act specifically stated that "[none of the funds appropriated herein shall be available to investigate and act upon applications for relief from Federal firearms disabilities under 18 *U.S.C. section* 925(c)." Treasury, Postal Service and General Government Appropriations Act, 1995, Pub.L. No. 103-329, 108 Stat. 2382, 2385 (1994). McGill then filed with the district court an application for the removal of his Sec. 922 Federal firearm disability. The district court promptly dismissed the application on the ground that it lacked jurisdiction. McGill filed a timely notice of appeal.

We review de novo a district court's dismissal for lack of subject matter jurisdiction. *Matter of Bradley,* 989 *F.2d 802, 804* (5th Cir.1993). Although we doubt that the

district court has original jurisdiction to consider *66 an application to remove the Federal firearm disability, we pretermit that question because it is clear to us that Congress suspended the relief provided by Sec. 925(c). "In the past, we similarly have reserved difficult questions of our jurisdiction when the case alternatively could be resolved on the merits in favor of the same party." *Norton v. Mathews,* 427 U.S. 524, 532, 96 S.Ct. 2771, 2775, 84 L.Ed. 672 (1976), cited in *Texas Employers' Ins. Ass'n v. Jackson,* 862 *F.2d* 491, 497 *n.* 8 (5th Cir.1988) (en bane), cert. denied. 490 U.S. *1035, 109 S.Ct.* 1932, *104 L.Ed.2d* 404 (1989).

Congress has the power to amend, suspend or repeal a statute by an appropriations bill, as long as it does so clearly. *Robertson v. Seattle Audubon Soc., 503 U.S.* 429, 440, *112 S.Ct 1407, 1414, 118 L.Ed.2d 73* (1992). "There can be no doubt that Congress could suspend or repeal the authorization contained in [a current statute] ...; and h could accomplish its purpose by an amendment to an appropriation bill, or otherwise." *United States v. Dickerson, 310 U.S. 554, 555,* 60 *S.Ct. 1034, 1035, 84 L.Ed. 1356 (1940).* "The whole question depends on the intention of Congress as expressed in the statutes." *United States v. Mitchell, 109 U.S. 146, 150, 3 S.Ct. 151, 153, 27 L.Ed. 887* (1883).

Thus the question of whether the appropriations bill suspended the relief available under Sec. 925(c) turns on the intent of Congress. Section 922, part of the Gun Control Act of 1968, was enacted in response to the increase in violence resulting from firearm possession. The act makes it unlawful for a convicted felon "to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to

receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." *18 U.S.C.* 922(g).

Congress also established a statutory framework under which a convicted felon could seek relief from the Federal firearms disability. Section 925(c) grants relief from Sec. 922 by providing:

A person who is prohibited from possessing, ... firearms or ammunition may make application to the Secretary for relief from the disabilities imposed by Federal laws ..., and the Secretary may grant such relief if it is established to his satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest. Any person whose application for relief from disabilities is denied by the Secretary may file a petition with the United States district court for the district in which he resides for a judicial review of such denial. The court may in its discretion admit additional evidence where failure to do so would result in a miscarriage of justice....

18 U.S.C. Sec. 925(c).

The Secretary delegated his authority to the Director of the ATF and adopted detailed regulations to govern the requirements an applicant must meet. *27 C.F.R. Sec. 178.144.* The ATF conducts a broad-based field investigation of the convicted applicant's record and reputation before ruling on the application. See *Smith v. Brady, 813 F.Supp. 1382, 1383-84* (E.D.Wis.1993)

(describes ATF's investigative procedures under Sec. 925(c)). By its terms, Sec. 925(c), gives the applicant the right to seek review in the district court only after the Secretary has denied her application. The district court is given authority to reverse the Secretary's order if the Secretary's denial was arbitrary, capricious or an abuse of discretion. *Bradley v. Bureau of Alcohol, Tobacco and Firearms, 736 F.2d 1238, 1240* (8th Cir.1984).

Even though Sec. 925(c) allows the district court to admit additional evidence in extraordinary circumstances, the legislative history of this amendment makes it clear that Congress intended for district courts to review only the Secretary's denial under an arbitrary and capricious standard. The Senate report states that this amendment "empowers the court to consider additional evidence in making its finding where a failure to do so might yield a miscarriage of justice. In such a case, the court might in its discretion request the presence of an agent representing the Secretary, and stay the action for a suitable time to permit the Secretary to review his findings in light of the additional evidence, then proceed forward in the event the evidence does not alter his determination." S.Rep. No. 476, 97th Cong., 2d Sess. 24 (1982); see also. David T. Hardy, The Firearms Owners' Protection Act: A Historical and Legal Perspective, 17 Cumb.L.Rev. 585, 644 (1987). We now turn to the appropriations acts which serve as the basis for the government's argument that the Sec. 925(c) relief has been suspended.

In the 1993 Appropriations Act for the Treasury Department, Congress specifically barred any funding for ATF "to investigate or act upon applications for relief from Federal firearms disabilities under *18 U.S.C. 925(c).*" Treasury Appropriations Act, 1993, Pub.L. No. 102-393,

106 Stat. 1729 (1992). This funding limitation was continued with the same language in the next two appropriations acts--Public Law 103-123 (1993) and Public Law 103-329 (1994). In these last two acts, however, funds were expressly appropriated to process applications filed by corporations for relief under Sec. 925(c).

In a report to the Senate, the Appropriations Committee explained why it withheld funds in the 1993 Appropriations Act for ATF action on applications for Sec. 925(c) relief:

> Under the relief procedure, ATF officials are required to determine whether a convicted felon, including persons convicted of violent felonies or serious drug offenses, can be entrusted with a firearm. After ATF agents spend many hours investigating a particular applicant[,] they must determine whether or not that applicant is still a danger to public safety. This is a very difficult and subjective task which could have devastating consequences for innocent citizens if the wrong decision is made. The Committee believes that the approximately 40 man-years spent annually to investigate and act upon these investigations and applications would be better utilized to crack down on violent crime. Therefore, the Committee has included language in the bill which prohibits the use of funds for ATF to investigate and act upon applications from relief from Federal firearms disabilities.
>
> S.Rep. No. 353, 102nd Cong., 2d Sess.77 (1992)

(emphasis added).

This report expresses concern over: (1) use of limited valuable resources for investigating these difficult cases and (2) consequences to innocent citizens if ATF makes a mistake and grants relief to a felon from his firearm disabilities.

By withdrawing funds to the ATF to process these applications under these circumstances and with this explanation by the appropriations committee, it is clear to us that Congress intended to suspend the relief provided by Sec. 925(c). We cannot conceive that Congress intended to transfer the burden and responsibility of investigating the applicant's fitness to possess firearms from the ATF to the federal courts, which do not have the manpower or expertise to investigate or evaluate these applications.

We disagree with the contrary conclusion of the Third Circuit in *Rice v. United States Dept. of Alcohol, Tobacco and Firearms, 68 F.3d 702, 707* (3d.Cir.1995). The *Rice* court concluded that "[t]he appropriation acts presently before us fail to show a clear intent to repeal section 925(c) or to preclude judicial review of BATF's refusal to grant relief from firearms disabilities "

We agree with *Moyer v. Secretary of Treasury, 830 F.Supp. 516* (W.D.Mo.1993). In that case the court found that the limitation on ATF's funds reflected a Congressional intent to suspend the ability of convicted felons to seek relief from Federal firearms disabilities.

We also find the history of funding for investigating applications from corporations as evidence of the intent of

Congress to suspend the relief available under Sec. 925(c). The initial 1993 Appropriations Act (Pub.L. No. 102-292) barred the ATF from using funds to investigate any applications. In the 1994 Appropriations Act (Pub.L. No. 103-123) Congress expressly restored funding to the ATF to investigate applications from corporations, but continued to withhold funds to investigate applications from individuals. If Congress thought the courts were considering applications for relief under Sec. 925(c), this restoration of funds to provide relief for corporations would have been unnecessary. In the 1995 Appropriations Act, Congress continued to provide funding for ATF to investigate corporate applications while maintaining its hold on funds to investigate individual applications.

We therefore conclude that relief from federal firearms disabilities for individuals under Sec. 925(c) is suspended by the last three appropriations acts.

McGill alternatively argues for the first time on appeal that, if we find Sec. 925(c) as repealed or suspended, we should also find that Sec. 922(g) was repealed or suspended. We will not consider an argument raised for the first time on appeal unless it rises to the standard of plain error. *United States v. Olano, 507 U.S. 725, 113 S.Ct 1 770, 123 L.Ed.2d 508* (1993). The standard for plain error is a clear or obvious error that affected substantial rights or seriously affected the fairness or integrity of the judicial proceeding. *United States v. Calverley, 37 F.3d 160, 162* (5th Cir.1994) (en banc), cert denied, --U.S.--, 115 S.Ct. 1266, 131 *L.Ed.2d 145* (1995). The district court certainly did not commit obvious error

in failing to declare Sec. 922(g) suspended[2].

For the reasons stated above, we conclude that Congress has suspended the relief provided in Sec. 925(c) for individuals. We therefore affirm the district court's dismissal.

AFFIRMED.

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2. We are satisfied that McGill's argument that Congress intended to suspend §922 is meritless. The explicit reason Congress withheld funding from ATF was not to give convicted felons the right to possess weapons but to allocate those funds to enforement. In a 1995 report to the House, the Committee on Appropriations stated:

> For the fourth consecutive year, the Committee has addes bill language prohibiting the use of Federal funds to process applications for relief from Federal firearms disabilities. The Committee understands the controversial nature of the underlying law allowing convicted felons to have their right to own a firearm restored. However those who commit serious crimes forfeit many rights and those who commit felonies should not be allowed to have their right to own a firearm restored. We have learned sadly that too many of these felons whose gun ownership rights were restored went on to commit violent crimes with firearms. There is no reason to spend the Government's time or taxpayer's money to restore a convicted felon's right to own a firearm.

H.R. Rep. No. 183, 104th Cong. 1st. Sess. 23 (1995).

APPENDIX B
[Filed June 5, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA	§	
	§	
VS.	§	Case No. 3-92-CR-290-X
	§	
KENNETH W. McGILL,	§	

ORDER

On the 27th day of March, 1995 came on to be heard Defendant, KENNETH W. McGILL's Application for Removal of Federal Firearms Disabilities in the above numbered and entitled cause, and came the Defendant, KENNETH W. McGILL, by and through his attorney of record and requested this Court to grant Defendant's Application for Removal of Federal Firearms Disabilities.

IT IS ORDERED AND DECREED that this Court does not have jurisdiction to rule on Defendant, KENNETH W. McGILL's, Application for Removal of Federal Firearms Disabilities.

SIGNED this 5th day of June, 1995.

/s/ Joe Kendall
JOE KENDALL
Judge Presiding
United States District Court

APPENDIX C
[Filed March 10, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA	§	
	§	
	§	
VS.	§	**Case No. 3-92-CR-290-X**
	§	
	§	
KENNETH W. McGILL,	§	

APPLICATION FOR REMOVAL OF FEDERAL FIREARMS DISABILITIES

TO THE HONORABLE JUDGE JOE KENDALL:

COMES NOW the Defendant, **KENNETH W. McGILL.**, by and through undersigned counsel and makes this Application for Removal of the Federal Firearms Disabilities imposed as a result of his conviction in the above styled and numbered cause. In support of said motion, the Defendant would show unto this Honorable Court as follows:

I.

In support of this Motion, Kenneth W. McGill relies upon the affidavits of Kenneth B. Travis and Edward A. Wolff; Jr., partners in TRAVIS, WOLFF &

COMPANY, L.L.P. and co-workers and partners of Kenneth W. McGill, and Dewey M. Dalton and David Watkins, personal friends of Kenneth W. McGill, attached hereto.

BACKGROUND FACTS

II.

The Defendant, Kenneth W. McGill, was sentenced on April 19, 1993. This Honorable Court placed the Defendant on probation for a period of two years as a result of his conviction based on a two count information, to wit: False Statement, 18 U.S.C. § 1014, and False Tax Return, 26 U.S.C. § 7206.

III.

On September 14, 1994, the Defendant was granted early release from probation, and the Court eliminated all of Defendant's conditions of probation.

IV.

Title 18 U.S.C. § 922(g)(l) prohibits anyone convicted of a crime punishable by imprisonment of a term exceeding one year from shipping, transporting or possessing any firearm or ammunition. However, 18 U.S.C. § 925(c) authorizes either the Secretary of Treasury or a District Court to specifically provide relief from the disabilities imposed by 18 U.S.C. § 922(g)(1).

LACK OF ADMINISTRATIVE REMEDY

V.

The statutory provision of 18 U.S.C. § 925(c) provides that a person may make application to the Secretary of the Treasury for relief from disabilities imposed by Federal laws with respect to the acquisition, receipt, transfer, shipment, transportation or possession of firearms. The Secretary may grant such relief if it is established to his satisfaction that the circumstances regarding the disability and the applicant's record and reputation are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest. This application process is done through the Bureau of Alcohol Tobacco & Firearms.

VI.

The Defendant, through counsel, has attempted to file an application with the Bureau of Alcohol, Tobacco & Firearms for relief of the firearms disability pursuant to 18 U.S.C. § 925(c). The Defendant, through counsel was specifically informed by the Bureau of Alcohol Tobacco & Firearms in Dallas, Texas, that applications for relief pursuant to 18 U.S.C. § 925(c): were no longer being accepted by them. The Bureau of Alcohol, Tobacco & Firearms further informed Defendant's counsel that Public Law 102-393 (1992)) the Treasury Department Appropriations Act, specifically provides that no funds are available to act upon applications for relief, and that no applications for same will be accepted.

VII.

It is a well-settled principal of administrative law that judicial review is available to bypass administrative processes, where the administrative process is inadequate or futile. *Honig v. Doe*, 109 S.Ct. 592 (1988). Further, when the administrative remedy is unavailable as in the circumstances of the Bureau of Alcohol Tobacco & Firearms, any application would be "patently futile" and therefore, relief from a District Court should be allowed. *Hessbrook v. Lennon*, 777 F.2d 999 (5th Cir. 1985). Therefore, Defendant believes that since the United States Congress has disallowed funding for the Bureau of Alcohol, Tobacco & Firearms' review of applications, no remedy may be had there.

VIII.

The Defendant, through counsel, believes that as a result of the inability of the Bureau of Alcohol Tobacco & Firearms to investigate and act upon applications under 18 U.S.C. § 925(c), the Defendant has in effect been denied relief from his disabilities by the Secretary of Treasury.

Title 18 U.S.C. § 925(c) provides further that when a person is denied relief from disabilities by the Secretary of Treasury, he may file a petition with the United States District Court of the district in which he resides for judicial review of such denial.

Therefore, the Defendant believes that it is legally and properly correct to file this application for relief in the District Court.

IX.

This Honorable Court, having reviewed all of the materials submitted prior to and during sentencing has sufficient information before it to make a determination that Kenneth W. McGill's record and reputation are such that. he will not likely act in a manner dangerous to the public safety and that the granting of the relief requested would not be contrary to the public safety. The Court also finds that if the Secretary of Treasury, through the Bureau of Alcohol, Tobacco & Firearms had been able to review and process this application, they in fact would have granted same. The Court therefore, in its discretion may find and hold that the disabilities imposed by 18 U.S.C. § 922(c) may be removed from Kenneth W. McGill.

SUBSEQUENT ADMINISTRATIVE RECORDS

X.

Furthermore, should this Court remove Defendant's firearms disabilities, Defendant, Kenneth W. McGill, moves this Court for an order clarifying the requirement to fill our administrative records as to whether or not Defendant has ever been convicted of a felony.

XI

In addition, should this Court remove Defendant's firearms disabilities, Defendant, Kenneth W. McGill, moves this Court to enter an order of declaration for all persons dealing with administrative issues of firearms ownership, that when conducting a criminal background investigation to determine Kenneth W. McGill's eligibility

to purchase, own or possess any firearm, that Kenneth W McGill's rights to own and possess has been restored.

XII

Mr. Richard H. Kamp, former Assistant United States Attorney and lead counsel for the Government in this case, is presently with the Professional Liability Section of the FDIC Legal Division, located at 1910 Pacific Avenue, Suite 1600, Dallas, Texas, 75201, (214-953-4911). Mr. Kamp has been contacted by Defendant's counsel regarding this Application for Removal of Firearms Disabilities and does not oppose the approval of this Application.

Mr. John Hinton, III, trial attorney, is presently in the tax division at the Bicentennial Building, 601 E. Street, N.W., Washington, D.C. 20044 (202) 514-8135. Mr. Hinton has been contacted by Defendant's counsel regarding this Application for Removal of Firearms Disabilities and does not oppose the approval of this Application.

WHEREFORE, PREMISES CONSIDERED the Defendant, Kenneth W. McGill, respectfully requests this Honorable Court to accept this application for removal of Federal Firearms Disabilities and pursuant to 18 U.S.C. § 925(c) issue an order which

1. Removes the disabilities imposed on the Defendant, Kenneth W. McGill by 18 U.S.C. 922(g)(1);

2. Supersedes any of the language in the form 4473 (the yellow form) of the Gun Control Act of

1968;

3. Administratively allows Kenneth W. McGill, when purchasing firearms, to answer "no" on questions related to whether he has plead Guilty or been convicted; and

4. Instructs all persons dealing with administrative issues of firearms ownership, that when conducting a criminal background investigation to determine Kenneth W. McGill's eligibility to purchase, own or possess any firearm, that Kenneth W. McGill's rights to own and possess has been restored.

Respectfully submitted,

/s/ Jim Burnham
6116 N. Central
Suite 515
Dallas, Texas 75206

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA	§	
	§	
VS.	§	Case No. 3-92-CR-290-X
	§	
KENNETH W. McGILL,	§	

AFFIDAVIT OF KENNETH B. TRAVIS
IN SUPPORT OF THE REMOVAL
OF FEDERAL FIREARMS DISABILITIES
IMPOSED ON KENNETH W. McGILL

STATE OF TEXAS	§	
	§	
COUNTY OF DALLAS	§	

BEFORE ME, the undersigned notary public in and for the said county and state, on this day personally appeared KENNETH B. TRAVIS, who after being duly sworn, did upon oath state the following:

1. "My name is KENNETH B. TRAVIS, and I give this Affidavit based on my personal knowledge and relationship with KENNETH W. MCGILL, and so state that the facts stated in this affidavit are true and correct. I am above the age of eighteen (18) years and competent to give testimony in any legal proceeding.

2. "I am a partner in Travis Wolffe, L.L.P.

3. "I have been a business partner of KENNETH W. McGILL for several years.

4. "I have known KENNETH W. MCGILL both professionally and personally for over seven (7) years.

5. "I am of the belief that if KENNETH W. McGILL's firearms disabilities are removed, he will not act in a manner dangerous to the public's safety.

6. "I further believe that removing the Federal Firearms Disabilities from KENNETH W. McGILL will not be contrary to the public interest since Mr. McGill has never exhibited any violent tendencies and is a well-respected member of society.

7. "Further Affiant sayeth not."

SIGNED this 20th day of February, 1995.

/s/ Kenneth B. Travis

SUBSCRIBED AND SWORN TO before me, by the said KENNETH B. TRAVIS on the 20th day of February, 1995, to certify which witness my hand and seal of office.

/s/ Walt Bailey
Notary Public in and for
the State of Texas

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA	§	
	§	
	§	
VS.	§	**Case No. 3-92-CR-290-X**
	§	
KENNETH W. McGILL,	§	

AFFIDAVIT OF EDWARD A. WOLFFE, JR. IN SUPPORT OF THE REMOVAL OF FEDERAL FIREARMS DISABILITIES IMPOSED ON KENNETH W. McGILL

STATE OF TEXAS	§
	§
COUNTY OF DALLAS	§

BEFORE ME, the undersigned notary public in and for the said county and state, on this day personally appeared EDWARD A. WOLFFE, JR., who after being duly sworn, did upon oath state the following:

1. "My name is EDWARD A. WOLFFE, JR., and I give this Affidavit based on my personal knowledge and relationship with KENNETH W. MCGILL, and so state that the facts stated in this affidavit are true and correct. I am above the age of eighteen (18) years and competent to give testimony in any legal proceeding.

2. "I am a partner in Travis Wolffe, L.L.P.

3. "I have been a business partner of KENNETH W. McGILL for several years.

4. "I have known KENNETH W. MCGILL both professionally and personally for over seven (7) years.

5. "I am of the belief that if KENNETH W. McGILL's firearms disabilities are removed, he will not act in a manner dangerous to the public's safety.

6. "I further believe that removing the Federal Firearms Disabilities from KENNETH W. McGILL will not be contrary to the public interest since Mr. McGill has never exhibited any violent tendencies and is a well-respected member of society.

7. "Further Affiant sayeth not."

SIGNED this 20th day of February, 1995.

/s/ Edward A. Wolffe, Jr.

SUBSCRIBED AND SWORN TO before me, by the said EDWARD A. WOLFFE, JR. on the 20th day of February, 1995, to certify which witness my hand and seal of office.

/s/ Walter Bailey
Notary Public in and for
the State of Texas

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA	§	
	§	
VS.	§	**Case No. 3-92-CR-290-X**
	§	
KENNETH W. McGILL,	§	

AFFIDAVIT OF DEWEY DALTON IN SUPPORT OF THE REMOVAL OF FEDERAL FIREARMS DISABILITIES IMPOSED ON KENNETH W. McGILL

STATE OF TEXAS	§
	§
COUNTY OF DALLAS	§

BEFORE ME, the undersigned notary public in and for the said county and state, on this day personally appeared DEWEY M. DALTON, who after being duly sworn, did upon oath state the following:

1. "My name is DEWEY M. DALTON, and I give this Affidavit based on my personal knowledge and relationship with KENNETH W. MCGILL, and so state that the facts stated in this affidavit are true and correct. I am above the age of eighteen (18) years and competent to give testimony in any legal proceeding.

2. "I am an attorney duly licensed to practice in the State of Texas and I have been in practice since 1966.

3. "I have known KENNETH W. MCGILL both professionally and personally for over twenty (20) years.

4. "I am of the belief that if KENNETH W. McGILL's firearms disabilities are removed, he will not act in a manner dangerous to the public's safety.

5. "I further believe that removing the Federal Firearms Disabilities from KENNETH W. McGILL will not be contrary to the public interest since Mr. McGill has never exhibited any violent tendencies and is a well-respected member of society.

6. "Further Affiant sayeth not."

SIGNED this 10th day of February, 1995.

/s/ Dewey M. Dalton

SUBSCRIBED AND SWORN TO before me, by the said DEWEY M. DALTON on the 10th day of February, 1995, to certify which witness my hand and seal of office.

/s/ Marjorie P. Bert
Notary Public in and for
the State of Texas

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA	§	
	§	
VS.	§	**Case No. 3-92-CR-290-X**
	§	
KENNETH W. McGILL,	§	

AFFIDAVIT OF DAVID WATKINS IN SUPPORT OF THE REMOVAL OF FEDERAL FIREARMS DISABILITIES IMPOSED ON KENNETH W. McGILL

STATE OF TEXAS	§
	§
COUNTY OF DALLAS	§

BEFORE ME, the undersigned notary public in and for the said county and state, on this day personally appeared DAVID WATKINS, who after being duly sworn, did upon oath state the following:

1. "My name is DAVID WATKINS, and I give this Affidavit based on my personal knowledge and relationship with KENNETH W. MCGILL, and so state that the facts stated in this affidavit are true and correct. I am above the age of eighteen (18) years and competent to give

testimony in any legal proceeding.

2 "I am an attorney duly licensed to practice in the State of Texas and I have been in practice since 1966.

3. "I have known KENNETH W. MCGILL both professionally and personally for over twenty (20) years.

4. "I am of the belief that if KENNETH W. McGILL's firearms disabilities are removed, he will not act in a manner dangerous to the public's safety.

5. "I further believe that removing the Federal Firearms Disabilities from KENNETH W. McGILL will not be contrary to the public interest since Mr. McGill has never exhibited any violent tendencies and is a well-respected member of society.

6. "Further Affiant sayeth not."

SIGNED this 16th day of February, 1995.

/s/ David Watkins

SUBSCRIBED AND SWORN TO before me, by the said DAVID WATKINS on the 16th day of February, 1995, to certify which witness my hand and seal of office.

/s/ Kimberley D. Gott
Notary Public in and for
the State of Texas

APPENDIX D
[March 22, 1995]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA	*	
	*	
v.	*	**CRIMINAL NO. 3:92-CR-290-X**
	*	
KENNETH W. MCGILL	*	

GOVERNMENT'S RESPONSE TO DEFENDANT'S APPLICATION FOR REMOVAL OF FEDERAL FIREARMS DISABILITIES

COMES NOW the United States as represented by the United States Attorney's Office, in opposition to the Defendant's Application for Removal of Federal Firearms Disabilities.[1]

On March 10, 1995, the defendant filed with this Court an application for removal of the federal firearms

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1. The defendant asserts, probably accurately, that the government trial counsel for this case, Richard Kamp and John Hinton, do not oppose this application. The undersigned submits that the absence of opposition should be qualified by two conditions: first, Mr. Kamp is no longer with the Justice Department and should not speak for it, and second, no consideration of the Court's jurisdiction or lack of jurisdiction weighed into the determinations of trial counsel. That issue of jurisdiction is the sole subject of this response.

disabilities imposed upon them by Title 18, United States Code, Section 922(g)(1). On March 17, 1995, this Court set the matter for evidentiary hearing to be conducted on March 27, 1995. The government would submit that there remains a question whether the Court has jurisdiction to entertain the defendant's application. In support of the motion the government would submit the following:

FEDERAL FIREARMS LAW AND REGULATIONS

The Gun Control Act of 1968 (GCA), as amended, makes it unlawful for any person convicted of a crime punishable by imprisonment for a term exceeding one year to ship or transport in interstate or foreign commerce of possess in or affecting commerce any firearm, or to receive any firearm which has been shipped or transported in interstate or foreign commerce. 18 United States Code, Section 922(g)(1).

Additionally, Title 18, United States Code, Section 925(c) provides that a person who is prohibited from possessing, shipping, transporting or receiving firearms may make application to the Secretary of the Treasury for relief from the disabilities imposed by federal law with respect to the acquisition, receipt, transfer, shipment, transportation or possession of firearms. Under Section 925(c), "the Secretary may grant such relief if it is established to his satisfaction that the circumstances regarding the conviction and the applicants' record and reputation are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest". (Emphasis added)

Section 925(c) further provides that whenever the

Secretary grants relief to any person he shall promptly publish in the federal register notice of such action together with the reasons therefore. The authority of the Secretary to grant relief has been delegated to the Director, Bureau of Alcohol, Tobacco and Firearms (ATF). See C.T.D. No. 120-01 (June 1992) formerly T.D. Order No. 221, 37 Fed. Reg. 11696, and 27 C.F.R. § 178, 144.

ATF regulations specify the requirements in connection with the submission of an application for relief from federal firearms disabilities under the GCA. Specifically, an application must include (1) a written statement from each of three references who are not related to the applicant by blood or marriage and who have known the applicant for at lease three years, recommending the granting of relief; (2) the applicant's written consent to examine and obtain copies of records and to receive statements and information regarding the applicant's background, including records, statements, and other information concerning employment, medical history, military service, and criminal record; and (3) if the applicant has a disabling conviction, a certified copy of the indictment or information, the judgment or conviction or record of any plea of nolo contendere or plea of guilty or finding of guilt by the court, and any pardon, expunction, setting aside or other record purporting to show that the conviction was rendered nugatory or that civil rights were restored. See 27 C.F.R. § 178.144(c)(1), (2), and (4).

Under the provisions of Section 925(c), any person whose application for a relief from disabilities is denied by the Secretary may file a petition with the United States District Court for the district in which he resides for a judicial review of such denial. Section 925(c) further

states the Court may in its discretion admit additional evidence, "where failure to do so would result in a miscarriage of justice." The courts have held that the arbitrary and capricious standard is the proper standard for judicial review of the denial of relief from federal firearms disabilities under Section 925(c). Bradley v. ATF, 690 F. Supp. 990, 994 (S.D.AL. 1988).

PUBLIC LAW NO. 102-393

The Treasury, Postal Service, and General Appropriations Act, 1993, Pub. L. No. 102-393, 1992 U.S.C.C.A.N. (106 Stat. 1729) became effective on October 6, 1992. Title I of the Act Appropriates sums for the Department of Treasury and the various treasury agencies (including ATF) for the fiscal year ending September 30, 1993. On October 29, 1993, the President signed Treasury's Fiscal Year Appropriations Bill. It is Public Law 103-123. It continues the prohibition on acting on relief applications except for "corporations". This statute effectively suspends ATF's authority under Section 925(c) to grant or deny relief applications during fiscal year 93-94. The effect of this statute is that all applications for relief from federal firearms disabilities (or request for such applications) received by ATF on or after October 6, 1992, are returned to the applicant.

DISTRICT COURT LACKS AUTHORITY TO GRANT RELIEF

Section 925(c) does not confer jurisdiction to this Court. Section 925(c) gives ATF the authority to review applications for relief from federal firearms disabilities and to grant such relief only if it is determined to the satisfaction of the agency that the circumstances regarding

the conviction and the applicant's record and reputation are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting the relief would not be contrary to the public interest. This section provides for judicial review (and the allowance of additional evidence if deemed necessary by the court) only upon the denial of a relief application by ATF. In Leon Moyer v. Secretary of the Treasury and the Bureau of Alcohol, Tobacco and Firearm, 830 F. Supp. 516, 518 (W.D.MI 1993), the District Court agreed with the government's argument that it lacked jurisdiction under 925(c) to review ATF's refusal to provide the plaintiff in that case with a relief application and to directly grant the requested relief. The District Court held that Pub. L. No. 102-393, 106 Stats 1729, 1732 (1992), effectively suspended the relief provisions of Title 18, United States Code, Section 925(c) for fiscal year 1993. The Moyer court found that ATF's failure to process a defendant's application through no fault of its own cannot be deemed a denial under § 925(c). Accordingly, the district court held that it did not have jurisdiction in the case.

Only after the Secretary "denies" an applicant relief may the applicant seek judicial review in federal court. Rice v. United States, 850 F. Supp. 306 (E.D.Pa. 1994). In this case, as in Moyer and Rice, there has been no arbitrary or capricious activity on the part of ATF in the processing of the defendant's application. There was no denial. Consequently, there is no jurisdictional basis for review by the Court.

The Moyer and Rice courts undoubtedly came to the sober conclusion that to recognize ATF's legislated inability to review applications for relief from disabilities

as "denials" would open the federal courts to petitions from "[a]ny person.. fil[ing] a petition with the United States district court for the district in which he resides for federal review of such denial." 18 U.S.C. § 925(c). Such a procedure would effectively substitute this Court for the ATF in processing petitions for relief from disabilities from defendants convicted in both federal and state courts that reside in this District. The enormity of the policy implications of the conclusions that no administrative review is tantamount to an administrative denial is readily apparent.

It is well established that Congress may proscribe the procedures and conditions under which judicial review of actions taken by administrative agencies may by had. City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 330, 336 (1956). See also Gismario v. Hurney, 311 F.2d 285 (3rd. Cir. 1962). When such a procedure is provided enabling legislation, "it is ordinarily supposed that Congress intended that procedure to be the exclusive means for judicial review in those cases to which it applies." City of Rochester v. Bond, 603 F.2d 927, 931 (D.C. Cir. 1979).

The general rule that the District Court should stay its hand in favor of the statutorily specified administrative scheme is predicated on a numerous of legislative and administrative policies. As articulated in McCart v. United States, 395 U.S. 185 (1969), these factors included among others: (1) allowing the agency to develop the necessary factual background upon which decisions would be based; (2) permitting the agency to exercise its discretion or apply its expertise ; (3) conserving state judicial resources since the complaining party may be successful in vindicating rights in the administrative process and the Courts may never have to intervene; and

(4) avoiding the possibility that "frequent and deliberate flouting of the administrative process could weaken the effectiveness of an agency by encouraging people to ignore its procedures." See Facchiano v. United States Department of Labor, 859 F.2d 1163, 1166, 1167 (3rd. Cir. 1988), cert. denied, 490 U.S. 1097 (1989); U.S. Postal Service v. Notestine, 857 F.2d 989, 993 (5th Cir. 1988).

Here, the administrative scheme was altered by legislative action. That has the natural and necessary consequences of precluding judicial review of the administrative "nonprocess."

CONCLUSION

For the reasons stated above, the government submits that the defendant's Application for Relief from Firearms Disabilities be denied.

Respectfully submitted,

PAUL E. COGGINS
UNITED STATES ATTORNEY

/s/ Robert L. Webster
ROBERT L. WEBSTER
Assistant United States Attorney
State of Texas Bar No. 21053375
1100 Commerce Street, Third Floor
Dallas, Texas 75242
214/767-0951

APPENDIX E

[Filed on Oct. 18, 1995]

Philip V. RICE, Appellant,
v.
UNITED STATES of America,
DEPARTMENT OF ALCOHOL, TOBACCO
AND FIREARMS, Appellee.

No. 94-1547.

United States Court of Appeals,
Third Circuit.

Argued Oct. 25, 1994.

Decided Oct. 18, 1995.

Before: STAPLETON, HUTCHINSON*, and GARTH, Circuit Judges.

OPINION OF THE COURT

HUTCHINSON, Circuit Judge.

I. Introduction

Appellant, Philip V. Rice ("Rice"), appeals an order of the United States District Court for the Eastern District of Pennsylvania dismissing his request for judicial review

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* This opinion was prepared by the Honorable William D. Hutchinson and approved by the panel prior to his untimely death.

of appellee's, the Bureau of Alcohol, Tobacco and Firearms's ("BATF"), refusal to process his application for relief from a firearm disability. Rice claimed that BATF acted contrary to the Gun Control Act of 1968 ("Act"), the Second Amendment and the Fifth Amendment.

Section 922(g)(l) of the Act prohibits persons convicted of crimes punishable by imprisonment in excess of one year from owning or possessing firearms. Rice was so convicted. Section 925(c) authorizes BATF to lift this prohibition if, after an investigation, it is satisfied that the convict will not be likely to act in a manner dangerous to public safety and that the granting of such relief would not be contrary to the public interest. Section 925(c) gives BATF broad discretion, but its exercise of this discretion is subject to judicial review. The statute does not confine a district court to the administrative record, but authorizes the reviewing courts to receive additional evidence if necessary to avoid a "miscarriage of justice." Despite BATF's authority to grant relief from a firearm disability, Congress in recent years has prohibited it from spending appropriated funds to investigate such applications.

The district court granted BATF's motion for summary judgment on the merits of Rice's constitutional claims. It concluded however that it lacked subject matter jurisdiction over his statutory claim for judicial review of BATF's inability to complete the investigation that is a prerequisite to its action granting a convict's section 925(c) application. The court reasoned that judicial review was unavailable because BATF had not finally denied Rice's application, but simply lacked any present means to continue processing it.

While we will affirm the district court's decision to

dismiss Rice's constitutional claims on their merits, we will reverse the order dismissing his section 925(c) claim and remand the case to the district court so that it can exercise its statutory discretion to decide whether BATF's failure to grant Rice the relief he seeks would be a miscarriage of justice. If it decides this question in the negative, it should dismiss Rice's request for judicial review on its merits. If it decides in the affirmative, Rice should be given an opportunity to present evidence relevant to section 925(c)'s standards for restoration of firearm privileges and thereafter the court should decide the merits of Rice's case on the completed record.

II. Factual and Procedural Background

Rice alleges these facts, all of which we assume are true at this stage of the case. In 1970, at age twenty, Rice pled guilty in a Pennsylvania state court to several related felonies involving stolen automobile parts. The state fined him and sentenced him to a term of probation.

The Act, 18 U.S.C.A. §§ 921-30 (West Supp.1995), as amended, prohibits a person convicted of "a crime punishable by imprisonment for a term exceeding one year" from possessing firearms.[1] 18 U.S.C.A. § 922(g)(1)

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1. Section 922(g)(1) provides in part:

> It shall be unlawful for any person--(1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year:
>
> * * * * *
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported

(West Supp.1995). It authorizes the Secretary of the Treasury to grant relief

> from the disabilities imposed by Federal laws with respect to the acquisition..... or possession of firearms..... if it is established to [the Secretary's] satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be

likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest.

18 U.S.C.A. § 925(c) (West Supp. 1995).

Rice claims that he did not realize his felony convictions deprived him of his right to own and possess firearms. As a hunter and a gun collector, he continued to possess them.

The Secretary's decision to grant or deny relief pursuant to section 925(c) is subject to judicial review. In this respect section 925(c) provides that the district court is not limited to the administrative record, but can admit additional evidence to avoid "a miscarriage of justice."[2]

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in interstate or foreign commerce.

18 U.S.C.A. § 922(g). *See also United States v. Essig*, 10 F.3d. 968 (3d. Cir. 1993).

2. Section 925(c) states:

The Secretary of the Treasury has delegated his authority to grant relief to the Director of BATF. See 27 C.F.R. § 178.144.

To determine whether an applicant is entitled to relief, BATF "conducts a broad based field investigation concentrating on [the] statutory criteria surrounding the applicant's disabling conviction and the applicant's record and reputation." Appendix ("App.") at 30. It also "interviews the applicant, the listed character references, employers, members of the community where the applicant lives, the applicant's probation officer and other local law enforcement officers," as well as other law enforcement records. *Id.*

Rice claims that he applied for restoration of his firearms privileges when he first became aware of the effect his state court guilty pleas had on his right to possess firearms. BATF's investigation revealed that Rice had purchased as many as fifty guns after his state conviction. BATF did not confiscate any of Rice's guns, but allowed him to turn them over to his father for safekeeping. Rice admitted these purchases and pled guilty to violating 18 U.S.C.A. § 922(g)(1). On the present record, it is not clear to us whether Rice

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> Any person whose application for relief from disabilities is denied by the Secretary may file a petition with the United States district court for the district in which he resides for a judicial review of such denial. The court may in its discretion admit additional evidence where failure to do so would result in a miscarriage of justice.

18 U.S.C.A. § 925(c).

voluntarily disclosed these violations to BATF when he filed his first application for relief or instead merely conceded them after BATF uncovered them in the course of its investigation.

On February 27, 1992 the Governor of Pennsylvania pardoned Rice's 1970 convictions, and the state court subsequently expunged his state criminal record. In June 1992 Rice again applied to BATF for restoration of his firearms privileges. BATF began a second investigation. It was unable to complete this investigation because Congress passed an appropriation bill for fiscal 1992-1993 (effective October 1992) that provided: "[N]one of the funds appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. 925(c)." Treasury, Postal Service, and General Government Appropriations Act, Pub.L. No. 102-393, 106 Stat. 1729, 1732 (1992). Congress imposed a similar spending prohibition on BATF for fiscal years 1993-1994 and 1994-1995. See Pub.L. No. 103-123, 107 Stat. 1226, 1228 (1993); Pub.L. No. 103-329, 108 Stat. 2382, 2385 (1994). It is currently considering extending the spending prohibition for fiscal 1995-96. See H.R. 2020, 104th Cong., 1st Sess. (1995). After the October 1992 prohibition, BATF informed Rice that it could not continue to process existing applications for relief from federal firearms disabilities and, therefore, that it was terminating further action on his application.

Rice then filed this action for judicial review of BATF's refusal to grant his June 1992 application. In his complaint he also claimed that BATF "is denying him his constitutional rights to bear arms under the Second Amendment and to due process and 'equal protection of

the laws' under the Fifth Amendment." Rice v. United States Dept. of Alcohol, Tobacco and Firearms, 850 F.Supp. 306, 308 (E.D.Pa. 1994). BATF moved to dismiss Rice's complaint or, in the alternative, for summary judgment. BATF argued that Rice is not entitled to judicial review of its refusal to act on his section 925(c) application because it has never finally denied the application; but, rather, was forced to stop processing it because Congress prohibited the use of appropriated funds for this purpose. BATF also contended that Rice's constitutional claims failed as a matter of law. Accepting BATF's contention that its inability to act on Rice's application did not constitute a denial under section 925(c), the district court dismissed his request for judicial review for lack of subject matter jurisdiction, and granted BATF's motion for summary judgment on the merits of Rice's constitutional claims.

III. Discussion

This Court's appellate jurisdiction over Rice's challenge to the district court's final decision is based upon 28 U.S.C.A. § 1291 (West 1993). A district court's dismissal for lack of jurisdiction is subject to plenary review. *Anthuis v. Colt Indus. Operating Corp.*, 971 F.2d 999, 1002 (3d Cir.1992); *Mellon Bank (East) PSFS v. Farino*, 960 F.2d 1217, 1220-21 (3d Cir.1992).

BATF's argument that the district court lacked jurisdiction over Rice's claim is straightforward. It begins with the proposition that district courts are courts of limited jurisdiction and cannot disregard or evade the limits that Congress imposes on them. See Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365, 98 S.Ct. 2396, 57 L.Ed.2d 274 (1978). BATF then contends

that section 925(c) is the exclusive avenue for relief from section 922(g)(1)'s prohibition against a convict's ownership or possession of firearms; that judicial review is only available after it has denied an application for relief; that it has not denied Rice's application; and that it cannot take any final action until the prohibited investigation is completed. The district court accepted BATF's argument, with a caveat. It stated:

> It is doubtful whether the [B]ATF may avoid judicial review under any and all circumstances simply by failing to process an application. In this instance, however, there is no evidence of bad faith or arbitrary or capricious conduct on the part of the agency. There has been no undue delay. Congress has eliminated the funding needed by the [B]ATF to process [Rice's] application. Consequently, the [B]ATF has suspended work on this and presumably other applications through no fault of its own. [B]ATF's failure to process [Rice's] application cannot be deemed a denial under § 925(c). This court has no jurisdiction, and [Rice] is not entitled to any relief from the court, as a result of Congress' elimination of [B]ATF appropriation for application review under § 925(c).

Rice, 850 F.Supp. at 308 (internal citations omitted); *see also Moyer v. Secretary of Treasury*, 850 F.Supp. 516, 518 (W.D.Mo. 1993) (suspension of funding for investigation is not the functional equivalent of a denial).

We believe the district court erred in holding that Congress's elimination of appropriations for investigating and acting on section 925(c) applications deprived it of

subject matter jurisdiction.[3] We believe the district court's order is more properly analyzed in terms of a failure to exhaust administrative remedies rather than a lack of subject matter jurisdiction.

Nevertheless, we have an independent threshold obligation to satisfy ourselves that the district court had subject matter jurisdiction. *See Beruler v. Williamsport Area School Dist.*, 475 U.S. 534, 106 S.Ct. 1326, 89 L.Ed.2d 501 (1986). Therefore, before reaching the exhaustion issue, we will consider whether Congress's repeated prohibitions against the use of funds to investigate section 925(c) applications evidences a legislative intent to repeal this section and deprive the district court of subject matter jurisdiction over BATF's inaction.

We do not question Congress's exclusive power to appropriate money and establish the jurisdiction of inferior federal courts. *See U.S.* Const., Art. I, §8 (appropriation power); U.S. Const., Art. III, § 1 ("The Judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."); *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 330, 58 S.Ct. 578, 581. 82 L.Ed. 872 (1938) ("There can be no question

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3. We have given careful consideration to Rice's constitutional claims that he "has been denied his Second Amendment Right to bear arms and to due process and to equal protection under the laws because the Government has failed and refused to process his application ... within a reasonable time." but conclude that they lack merit. Appellant's Brief at 12. Thus, we will affirm the district court's grant of summary judgment with respect to them. *See Rice*, 850 F.Supp. at 308-09.

of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States.") (footnote omitted); *Kline v. Burke Coast. Co.*, 260 U.S. 226, 234, 43 S.Ct. 79, 82, 67 L.Ed. 226 (1922) (Congress "may give, withhold or restrict ... jurisdiction at its discretion"); *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449, 12 L.Ed. 1147 (1850) ("the disposal of the judicial power ... belongs to Congress"). It may also use appropriation acts to amend or repeal substantive legislation. *See Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 440, 112 S.Ct. 1407, 1414, 118 L.Ed.2d 73 (1992); *United States v. Dickerson*, 310 U.S. 554, 555, 60 S.Ct. 1034, 1035, 84 L.Ed. 1356 (1940); *Director, OWCP v. Alabama ByProducts Corp.*, 560 F.2d 710, 719 (5th Cir. 1977). Furthermore, Congress can preclude Judicial review of administrative action, subject to constitutional constraints. *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 672-73, 106 S.Ct. 2133, 2136-37, 90 L.Ed.2d 623 (1986). Nevertheless, before courts will hold that Congress has used an appropriation act to repeal substantive legislation or preclude judicial review of administrative action, the intention to do so must be clearly stated. *See Robertson*, 503 U.S. at 440, 112 S.Ct. at 1414 (Congress "may amend substantive law in an appropriations statute, as long as it does so clearly."); *Johnson v. Robison*, 415 U.S. 361, 373-74, 94 S.Ct. 1160, 1168-69, 39 L.Ed.2d 389 (1974) (courts require "clear and convincing evidence of congressional intent . . . before a statute will be construed to restrict access to judicial review") (internal quote omitted).

The appropriation acts presently before us fail to show a clear intent to repeal section 925(c) or to preclude judicial review of BATF's refusal to grant relief from firearms disabilities. The relevant portion of the appropriation act for 1992-93 states only: [N]one of the

funds appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. 925(c). Pub.L. No. 102-393, 106 Stat. 1729, 1732 (1992). The 1993-94 act merely extended the previous year's prohibition in similar terms, as did the 1994-95 act. All three limit BATF's ability to spend appropriated funds to investigate section 925(c) applications, but none of them expressly preclude a court from reviewing BATF's refusal to process an application for relief. Absent more explicit language, we are unwilling to interpret these appropriation act provisions as repealing section 925(c), either in its entirety, or specifically with respect to its provision for judicial review of administrative decisions concerning a convict's application for restoration of his firearms privileges. This conclusion makes it unnecessary for us to explore any limits on Congress's broad legislative powers to control appropriations. *See Andrus v. Sierra Club,* 442 U.S. 347, 99 S.Ct. 2335, 60 L.Ed.2d 943 (1979); *Tennessee Valley Auth.. v. Hill,* 437 U.S. 153, 98 S.Ct. 2279, 57 I..Ed.2d 117 (1978).

Having concluded that Congress has not repealed the statute or restricted judicial review to deprive the district court of subject matter jurisdiction over Rice's challenge, we next consider whether BATF's inability to process Rice's application is a final denial. As we have already stated, we believe the doctrine of exhaustion of administrative remedies. Exhaustion, though often referred to as a question of jurisdiction, does not have the same rigidity as true issues of subject matter jurisdiction. A district court cannot consider a case without subject matter jurisdiction, but failure to exhaust is not always fatal. *See Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51, 58 S.Ct. 459, 463, 82 L.Ed. 638 (1938) (describing exhaustion as a "rule of judicial

administration"); see also *McCarthy v. Madigan*, 503 U.S. 140, 112 S.Ct. 1081, 117 L.Ed.2d 291 (1992). As recently described by the Supreme Court, "[t]he doctrine of exhaustion of administrative remedies is one among related doctrine--including abstention, finality, and ripeness--that govern the timing of federal court decisionmaking." *McCarthy*, 503 U.S. at 144, 112 S.Ct. at 1085.

The general rule concerning exhaustion is "'that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.'" *McKart v. United States*, 395 U.S. 185, 193, 89 S.Ct. 1657, 1662, 23 L.Ed.2d 194 (1969) (quoting Myers, 303 U.S. at 50-51, 58 S.Ct. at 463); see also *McCarthy*, 503 U.S. at 144-45, 112 S.Ct. at 1085-86 ("This Court long has acknowledged the general rule that parties exhaust prescribed administrative remedies before seeking relief from the federal courts.") (citing *Myers*, 303 U.S. at 50-51 and n. 9, 58 S.Ct. at 463 and n. 9). "Exhaustion is required because it serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency." *McCarthy*, 503 U.S. at 145, 112 S.Ct. at 1086. A significant inquiry in determining the applicability of the exhaustion doctrine is congressional intent and, "[w]here Congress specifically mandates, exhaustion is required." *Id.* at 144, 112 S.Ct. at 1085.

To decide an exhaustion issue "federal courts must balance the interest of the individual in retaining prompt access to a federal judicial forum against countervailing institutional interests favoring exhaustion." *Id.* at 146, 112 S.Ct. at 1087. "Application of this balancing principal is 'intensely practical' because attention is directed to both the nature of the I claim presented and the characteristics

of the particular administrative procedure provided." *Id.* (quotation omitted). Thus, a court may decline "to require exhaustion in some circumstances even where administrative and judicial interests would counsel otherwise." *Id.*; see also *id.* at 144, 112 S.Ct. at 1085 ("where Congress has not clearly required exhaustion, sound judicial discretion governs") (citations omitted); *Coit Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561, 579, 109 S.Ct. 1361, 1371, 103 L.Ed.2d 602 (1989) ("Where a statutory requirement of exhaustion is not explicit, "courts are guided by congressional intent in determining whether application of the doctrine would be consistent with the statutory scheme.," ") (quoting *Patsy v. Florida Bd. of Regents*, 457 U.S. 496, 502 n. 4, 102 S.Ct. 2557, 2560 n. 4, 73 L.Ed.2d 172 (1982)).

In *McCarthy* the Supreme Court described "three broad sets of circumstances in which the interest of the individual weigh heavily against requiring administrative exhaustion." *Id.* First, a court is less likely to apply exhaustion when it may cause "undue prejudice to subsequent assertion of a court action." *McCarthy*, 503 U.S. at 146-47, 112 S.Ct. at 1087. One way in which this "undue prejudice" may occur is by "an unreasonable or indefinite timeframe for administrative action." *Id.* at 147, 112 S.Ct. at 1087 (citations omitted). Second, a court may excuse exhaustion when there is "'some doubt as to whether the agency was empowered to grant effective relief.'" Id. (quoting *Gibson v. Berryhill*, 411 U.S. 564, 575 n. 14, 93 S.Ct. 1689, 1696 n. 14, 36 L.Ed.2d 488 (1973)). Third, exhaustion may not be required when the agency "is shown to be biased or has otherwise predetermined the issue before it." *Id.* at 148, 112 S.Ct. at 1088 (citing *Gibson*, 411 U.S. at 575 n. 14, 93 S.Ct. at 1696 n. 14).

In *Coit Independence*, the Supreme Court addressed the first situation. In that case, the Court reviewed the adequacy of FSLIC proceedings to determine claims against savings and loan associations under FSLIC receivership. The claim in question was retained for "further review" and held without action for over 13 months. *Coit Independence*, 489 U.S. at 586, 109 S.Ct. at 1375. The Court held that "[t]he lack of a reasonable time limit in the current administrative claims procedure render[ed] it inadequate" and "[a]dministrative remedies that are inadequate need not be exhausted." *Id.* at 587, 109 S.Ct. at 1375; see also *id.* ("Because the Bank Board's regulations do not pace a reasonable time limit on FSLIC's consideration of claims, Coit cannot be required to exhaust those procedures.") (citations omitted); *Honig v. Doe*, 484 U.S. 305, 327, 108 S.Ct. 592, 606, 98 L.Ed.2d 686 (1988) (parties "may bypass the administrative process where exhaustion would be futile or inadequate") (citations omitted); *Glover v. St. Louis-San Francisco Ry.*, 393 U.S. 324, 330, 89 S.Ct. 548, 551, 21 L.Ed.2d 519 (1969) (applying one "of the most obvious exceptions to the exhaustion requirement—the situation where the effort to proceed formally with ... administrative remedies would be wholly futile").

In this case, the balancing test described in *McCarthy*, in conjunction with the principles of *Coit Independence*, favors judicial waiver of the exhaustion doctrine. Although the four month delay before passage of the appropriation act may have been reasonable, the indefinite delay imposed after its passage is unreasonable. BATF concedes that it cannot state a date on which it will consider Rice's application, nor can it even state whether it will ever consider his application. In fact, after Congress enacted the appropriation act BATF notified

Rice that, even if Congress removed the restrictions currently imposed, he "would need to submit an updated application" to restore his federal firearms privileges. App. at 32. BATF also clearly stated that it had concluded its participation in this process and it is not preparing any further record that would help the court in resolving this dispute.

Nevertheless, this case poses a special problem. The initial determination that Rice qualifies for relief from his firearm disability involves the exercise of BATF's discretion and relies on BATF's expertise—two factors that favor strict application of the exhaustion requirement. *See McCarthy*, 503 U.S. at 145, 112 S.Ct. at 1086 ("Exhaustion concerns apply with particular force when the action under review involves exercise of the agency's discretionary power or when the agency proceedings in question allow the agency to apply its special expertise.") (citations omitted); *McKart*, 395 U.S. at 194, 89 S.Ct. at 1662 ("it is normally desirable to let the agency develop the necessary factual background upon which decisions should be based"). Were it not for the express authority section 925(c) gives district courts to receive independent evidence when necessary to avoid a miscarriage of justice, we would be hesitant to excuse exhaustion where, as here, Congress has entrusted a decision to an agency under standards including one so broad as ensuring the public interest.

With that said, however, it seems clear to us that Congress did not intend to apply rigidly the doctrine of exhaustion of administrative remedies in this context because it gave the district courts discretion to create or supplement the administrative record when necessary to avoid a miscarriage of justice. What further part the agency should play in the ongoing court proceedings if the

district court decides that it is necessary to receive independent evidence as to whether Rice has become fit for relief from his firearms disability is not presently before us. In that respect the record is not yet complete. We note, however, that the relevant provisions of the appropriation acts do not seem to preclude the agency from presenting its views on the propriety of granting Rice's application on the record created in a judicial forum.

Against this backdrop, we can think of few administrative remedies that would be more inadequate than the one presented by BATF. Indeed, little to no benefit could be achieved by requiring further exhaustion. Therefore, under all these circumstances, we hold that Rice need not exhaust administrative remedies to invoke the judicial review provision of section 925(c). We thus will reverse the district court's order dismissing Rice's statutory claim for lack of jurisdiction.

On remand, the district court should determine in the exercise of its sound discretion whether the failure to admit Rice's evidence would result in a miscarriage of justice. Following that initial decision, the district court should then decide, on the basis of all the evidence before it, whether Rice has met his burden of showing he "will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not he contrary to the public interest." *Id.*

Before ending our analysis, we believe that it is appropriate to comment on some other issues that are likely to arise in the course of the proceedings on remand. Though Rice's ignorance of section 922(g)(1)'s prohibition cannot excuse his criminal violation of that section, it may

be relevant to his fitness for relief under section 925(c). Similarly, Rice's argument that his federal conviction for violation of section 922(g)(1) is a nullity fails. *See United States v. MacGregor,* 617 F.2d 348 (3d Cir.1980) (affirming a conviction for possession of a firearm where the predicate federal convictions were reversed on appeal after defendant's firearms conviction). Nevertheless, this fact also may be relevant to Rice's claim for relief under section 925(c). Finally, we are reminded that the Supreme Court has held that the right to possess a firearm is a privilege, not a right. *Lewis v. United States,* 445 U.S. 55, 100 S.Ct. 915, 63 L.Ed.2d 198 (1980). Thus, Rice bears a heavy burden in his attempt to support his statutory claim.

IV. Summary

We will summarily affirm the district court's grant of summary judgment in favor of BATF on Rice's constitutional claims. With respect to Rice's statutory claim, however, we hold: (1) the appropriation acts prohibiting BATF from expending funds to process Rice's section 925(c) application for relief do not evidence an intent to repeal or limit the district court's jurisdiction to review BATF's prolonged inaction on Rice's section 925(c) application; hence, the district court should not have dismissed Rice's petition for lack of subject matter jurisdiction; and (2) BATF's continuing inability to process Rice's section 925(c) application constitutes an undue delay excusing Rice from exhausting his administrative remedies that allows him to seek judicial review.

Accordingly, we will remand this case to the district court to determine in the exercise of its sound discretion whether the facts Rice alleges indicate a potential for a miscarriage of justice. If so, it should then permit Rice to

submit additional evidence of his fitness to have his firearms privileges restored and, thereafter, decide whether Rice's application satisfies section 925(c)'s standards for restoration of a convict's firearms privileges.

V. Conclusion

The order of the district court dismissing this case is reversed, and the case is remanded to the district court for further proceedings consistent with this opinion.

(2)

Supreme Court, U.S.
FILED
AUG 16 1996
CLERK

No. 95-2015

In the Supreme Court of the United States

OCTOBER TERM, 1995

KENNETH W. MCGILL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Convicted felons are not allowed to own or possess guns. The Bureau of Alcohol, Tobacco & Firearms (ATF) is statutorily authorized to grant applications for relief from that prohibition. Since 1992, however, every Department of the Treasury appropriations statute has specified that ATF may not expend any appropriated funds to act upon such applications. The question presented is whether federal district courts have authority to consider the merits of such applications in the first instance.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 74 F.3d 64. The order of the district court (Pet. App. 10a-11a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 1996. The petition for a writ of certiorari was filed on April 15, 1996, and placed on this Court's docket on June 17, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under federal law, persons convicted of crimes punishable by a term of imprisonment in excess of one year are prohibited from owning or possessing firearms. 18 U.S.C. 922(g)(1).[1] The Director of ATF is authorized to lift that prohibition if, after an investigation, "it is established to his satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." 18 U.S.C. 925(c).[2]

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[1] Section 922(g)(1) provides:

> (g) It shall be unlawful for any person —
>
> (1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year;
>
> * * *
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

[2] Section 925(c) provides:

> A person who is prohibited from possessing, shipping, transporting, or receiving firearms or ammunition may make application to the Secretary for relief from the disabilities imposed by Federal laws with respect to the acquisition, receipt, transfer, shipment, transportation, or possession of firearms, and the Secretary may grant such relief if it is established to his satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant

In each of the annual ATF appropriations bills passed since 1992, however, Congress has expressly forbidden ATF from using any appropriated funds to investigate or act upon applications for relief under Section 925(c):

> [N]one of the funds appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. 925(c).

Treasury, Postal Service, And General Government Appropriations Act, 1996, Pub. L. No. 104-52, 109 Stat. 471 (1995); Treasury, Postal Service, And General Government Appropriations Act, 1995, Pub. L. No. 103-329, 108 Stat. 2385 (1994); Treasury, Postal Service, And General Government Appropriations Act, 1994, Pub. L. No. 103-123, 107 Stat. 1228 (1993); Treasury, Postal Service, And General Government Appropriations Act, 1993, Pub. L. No. 102-393, 106 Stat. 1732 (1992). Congress imposed that ban because it concluded that an ATF determination to grant relief "could have devastating consequences for innocent citizens if the wrong decision is made," and that

---

> will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest. Any person whose application for relief from disabilities is denied by the Secretary may file a petition with the United States district court for the district in which he resides for a judicial review of such denial. The court may in its discretion admit additional evidence where failure to do so would result in a miscarriage of justice.

This statute refers to the Secretary of the Treasury. 18 U.S.C. 921(a)(18). The Secretary's functions under this provision have been delegated to the Director of ATF. 27 C.F.R. 178.144.

ATF's scarce resources "would be better utilized" on more pressing matters, such as fighting crime. S. Rep. No. 106, 103d Cong., 1st Sess. 20 (1993); S. Rep. No. 353, 102d Cong., 2d Sess. 19-20 (1992). The House Report accompanying the current prohibition reiterated that "[t]here is no reason to spend the Government's time or taxpayers' money to restore a convicted felon's right to own a firearm." H.R. Rep. No. 183, 104th Cong., 1st Sess. 15 (1995).

2. Petitioner is a convicted felon. In 1995, he filed with ATF an application for relief from his federal firearms disabilities under 18 U.S.C. 925(c). ATF responded that no action would be taken on his application in light of Congress's explicit restriction on the use of appropriated funds. Pet. App. 2a.

Petitioner subsequently filed suit in federal district court. Petitioner did not dispute that ATF was prohibited by law from acting upon his application for relief. Rather, petitioner asked the district court to conduct its own inquiry into his fitness to possess a gun, and to issue a judicial order restoring his firearms privileges. Pet. App. 12a-18a. Rejecting petitioner's request, the district court issued a brief order stating that it was without authority to consider in the first instance the merits of petitioner's application. *Id.* at 10a-11a.

3. The court of appeals affirmed. Pet. App. 1a-9a. Relying on the text and legislative history of the pertinent funding provisions, the court concluded that, by prohibiting ATF from using appropriated funds to investigate or act upon applications for relief under 18 U.S.C. 925(c), Congress intended to suspend the operation of the statute.

> By withdrawing funds to the ATF to process these applications under these circumstances and with this explanation by the appropriations committee, it is clear to us that Congress intended to suspend the relief provided by Sec. 925(c). We cannot conceive that Congress intended to transfer the burden and responsibility of investigating the applicant's fitness to possess firearms from the ATF to the federal courts, which do not have the manpower or expertise to investigate or evaluate these applications.

Pet. App. 7a. Acknowledging that its decision was in conflict with *Rice* v. *United States Dep't of Alcohol, Tobacco and Firearms*, 68 F.3d 702 (3d Cir. 1995), the court stated that "[w]e disagree with the contrary conclusion of the Third Circuit." *Ibid.*

ARGUMENT

The court of appeals' decision is correct. Although the court's decision is in conflict with a decision of the Third Circuit, review by this Court is not warranted.

1. a. "[W]hen Congress desires to suspend or repeal a statute in force, there can be no doubt that * * * it may accomplish its purpose by an amendment to an appropriation bill." *United States* v. *Will*, 449 U.S. 200, 222 (1980) (quoting *United States* v. *Dickerson*, 310 U.S. 554, 555 (1940)). "The whole question depends upon the intention of Congress as expressed in the statutes." *Will*, 449 U.S. at 222 (quoting *United States* v. *Mitchell*, 109 U.S. 146, 150 (1883).

As the court of appeals concluded, the text of ATF's last four appropriation bills and their accompanying legislative history show that Congress intended to suspend the operation of Section 925(c). In each of

those appropriation bills, Congress expressly provided that "none of the funds appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. 925(c)." 109 Stat. 471; 108 Stat. 2385; 107 Stat. 1228; 106 Stat. 1732. The legislative history accompanying those bills explained the reasons for that prohibition: an ATF determination to grant relief "could have devastating consequences for innocent citizens if the wrong decision is made," and ATF's scarce resources "would be better utilized" on more pressing matters, such as fighting crime. S. Rep. No. 106, *supra*, at 20; S. Rep. No. 353, *supra*, at 19-20. The House Report to the current ban categorically states that "those who commit felonies should not be allowed to have their right to own a firearm restored. * * * There is no reason to spend the Government's time or taxpayers' money to restore a convicted felon's right to own a firearm." H.R. Rep. No. 183, *supra*, at 15. Thus, while Section 925(c) has not been repealed, Congress has effectively suspended its operation.

b. Relying on the Third Circuit's analysis in *Rice*, petitioner contends (Pet. 7-8) that, while Congress has disabled ATF from acting upon applications for relief, the district courts are under no such disability. That contention is unpersuasive.

Section 925(c) provides that relief from firearms disabilities may be granted if "it is established to [ATF's] satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." 18 U.S.C. 925(c). Section 925(c) therefore gives ATF broad discretion to decide

whether to grant an application. That discretion is subject to judicial review. *Ibid.* But the precondition for such review is the *denial* of an application. The judicial review provision expressly states that "[a]ny person whose application for relief from disabilities is *denied* by [ATF] may file a petition with the United States district court for the district in which he resides for a judicial review of such *denial*." *Ibid.* (emphasis added).

ATF has not "denied" petitioner's application within the meaning of Section 925(c). Under its appropriation bill, ATF is statutorily forbidden from taking any action at all on Section 925(c) applications: it may neither grant nor deny them. *Moyer* v. *ATF*, 830 F. Supp. 516, 518 (W.D. Mo. 1993). Because ATF did not deny petitioner's application, but simply failed to process it, petitioner had no right to seek judicial review in the district court under Section 925(c). That provision, in context, authorizes review only of ATF's exercise of the discretion conferred on it.

Even if ATF's refusal to process petitioner's application were treated as a denial, it would not assist petitioner. The Administrative Procedure Act provides the standard for reviewing ATF denials of applications. To obtain relief, the person seeking review must show that ATF's denial is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). See *Bradley* v. *Bureau of Alcohol, Tobacco and Firearms*, 736 F.2d 1238, 1240 (8th Cir. 1984). Petitioner cannot make such a showing. Congress directed ATF not to investigate or act upon applications for relief under Section 925(c). ATF's compliance with that Congressional mandate is not "arbitrary, capricious, an abuse

of discretion, or otherwise not in accordance with law."

Relying on the Third Circuit's decision in *Rice*, petitioner contends (Pet. 7-8) that the agency's indefinite delay in processing his application constitutes "unreasonable delay." *Rice*, 68 F.3d at 709; see also *id.* at 710 ("undue delay"). The Administrative Procedure Act authorizes an individual to obtain relief from a court when an agency engages in "unreasonabl[e] delay[ ]." 5 U.S.C. 706(1). Where, as here, Congress prohibits an agency from acting, however, the agency's compliance with that command cannot constitute "unreasonable delay" within the meaning of 5 U.S.C. 706(1). Petitioner's reliance on the concept of unreasonable delay is misplaced for another reason as well. The ordinary remedy for agency delay is an injunction ordering prompt agency action. See 5 U.S.C. 706(1) (court may "compel agency action unlawfully withheld or unreasonably delayed"). Here, requiring ATF to act upon petitioner's application would contravene Congress's express prohibition.

While framing his action as one seeking judicial review of an ATF denial, in reality petitioner has asked the district court to consider the merits of his application in the first instance. Section 925(c), however, does not authorize a district court to conduct such an inquiry. Section 925(c) provides that the Director of ATF may grant relief from a firearms disability "if it established to *his* satisfaction" that relief is warranted (18 U.S.C. 925(c) (emphasis added)). Congress has enacted no analogous provision authorizing district judges to grant relief if the need for relief is established to their satisfaction. As we have noted, Congress has entrusted district courts with a more limited role: judicial "review" of ATF

"denials." That circumscribed judicial review authority does not permit district courts to substitute their judgment for that of ATF, much less exercise that judgment in the first instance. *Bagdonas* v. *ATF*, 884 F. Supp. 1194, 1198 (N.D. Ill. 1995); *Young* v. *ATF*, 690 F. Supp. 990, 994 (S.D. Ala. 1988) (citing *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416 (1971)).

Contrary to the Third Circuit's view in *Rice* (68 F.3d at 709), a court's authority under Section 925(c) "to admit additional evidence where failure to do so would result in a miscarriage of justice" does not suggest that courts have authority to determine in the first instance whether relief under the statute is warranted. The authority to admit additional evidence is not freestanding; it may be exercised only in connection with a "review" of an ATF "denial" (18 U.S.C. 925(c)), in order to determine whether that denial is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" (5 U.S.C. 706(2)(A)).

c. Petitioner's interpretation of Section 925(c) would also create inordinate practical difficulties, reinforcing the conclusion that Congress could not have intended to leave open the possibility that a person could seek relief from firearms disabilities from the district court in the first instance. By statute, relief from firearms disabilities may be granted only if "the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety." 18 U.S.C. 925(c). In order to determine whether an applicant satisfies those criteria, the ATF conducts an extensive field investigation that includes interviews of the applicant himself as well as his character references,

employers, neighbors, and probation officer. See, *e.g.*, *Rice*, 68 F.3d at 705; *Bagdonas*, 884 F. Supp. at 1199 (describing detailed background check). Federal district courts are ill equipped to conduct such investigations themselves.

The Third Circuit in *Rice* suggested that "the relevant provisions of the appropriation acts do not seem to preclude the agency from presenting its views on the propriety of granting [the felon's] application on the record created in a judicial forum." *Rice*, 68 F.3d at 709. That suggestion does not obviate the practical difficulties discussed above. ATF's appropriation bill precludes ATF from investigating any applications for relief under 18 U.S.C. 925(c), and there is no exception from that prohibition that would permit the ATF to conduct such investigations in response to a suit filed in federal district court. Absent the ability to investigate the applicant and his circumstances, neither ATF nor the district court can reliably assess whether relief under Section 925(c) is warranted.

2. The conflict between the court's decision in this case and the Third Circuit's decision in *Rice* does not warrant this Court's review. Both the decision below and the ruling in *Rice* are recent, and no other court of appeals has yet addressed the question on which those courts have disagreed. The issue is currently pending in a number of cases across the country, including matters on appeal in the Sixth and Ninth Circuits. *Chick* v. *ATF*, No. 95-5981 (6th Cir.); *Burtch* v. *United States*, No. 96-35066 (9th Cir.). We anticipate that those circuits will agree with the court of appeals' decision in this case, and that a consensus in the courts of appeals will begin to

emerge. At that point, the Third Circuit may reconsider its decision in *Rice*.[3]

Moreover, the decision in *Rice* has not had significant consequences thus far. In particular, we are informed that no felon has yet obtained relief from a district court in that circuit, and that no applications for relief are currently pending before district courts there (other than the application in *Rice* itself). For those reasons, while it is possible that the issue presented by petitioner may call for this Court's review at some later date, review at this time would be premature.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1996

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[3] The Third Circuit currently stands alone. Every district court that has addressed the issue, including both the district court in this case (Pet. App. 10a-11a), and the district court in *Rice* (see 68 F.3d at 704), has reached the same conclusion as the court of appeals here. See, *e.g.*, *Owen* v. *Magaw*, No. 96-4039-RDR (D. Kan. July 29, 1996), slip op. 5; *Moyer*, 830 F. Supp. at 518.

(3)

Supreme Court, U.S.
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No. 95-2015

IN THE
Supreme Court of the United States
October Term, 1995

KENNETH W. McGILL,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

Petition For Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY TO RESPONDENT'S BRIEF FOR THE UNITED STATES IN OPPOSITION

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

1. **In the face of conflicting circuit courts, it is unclear whether a convicted felon may have the district court review and render a decision as to whether his firearms disabilities should be removed since the Bureau of Alcohol, Tobacco and Firearms is no longer able to process a convicted felon's application for removal of Federal firearms disabilities.**

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CITATION TO OPINION BELOW

The Decision of the United States Court of Appeals for the Fifth Circuit is reported at 74 F.3d 64 (5th Cir. 1996)

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1254 because appellant seeks review of an adverse decision rendered by the United States Court of Appeals for the Fifth Circuit.

ARGUMENT AGAINST RESPONDENT'S OPPOSITION

Respondent's arguments in its Brief For The United States in Opposition (hereinafter referred to as "Respondent's Brief") is unpersuasive. Instead of arguing against Petitioner's Petition for Writ of Certiorari, Respondent's Brief admits the very argument Petitioner has propounded to the Court.

Respondent, citing Moyer v. ATF, 830 F.Supp. 516, 518 (W.D. Mo. 1993), argues (Resp. 7) that the "ATF is statutorily forbidden from taking any action at all on Section 925(c) applications; it may neither grant nor deny them." The inability of the ATF to take any action at all is precisely the reason why the district court should have jurisdiction to rule if the individual should have his Federal firearms disabilities removed. In most cases, the exhaustion doctrine prevents judicial review unless the plaintiff has exhausted all of his administrative remedies. However, the exhaustion doctrine may be bypassed if the individual's fact situation satisfies any of the exceptions to the exhaustion doctrine. These exceptions are set out in Christopher W. v. Portsmouth School Committee, 877 F.2d 1089, 1094 (5th Cir. 1989) and Hessbrook v. Lennon, 777 F.2d 999, 1003 (5th Cir. 1986) and are as follows:

1. It would be patently futile to use the due process procedures;

2. An agency has adopted a policy or pursued a practice of general applicability that is contrary to the law;

3. It is improbable that adequate relief can be

obtained by pursuing administrative remedies (e.g. the hearing officer lacks the authority to grant the relief sought); or

4. Where the available administrative remedies either are unavailable or wholly inappropriate to the relief sought.

The existence of these exceptions to the exhaustion doctrine are further evidenced by the case of Honig v. Doe, 484 U.S. 305, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988). In Honig, the Court emphasized that judicial review is normally not available until all administrative proceedings are completed; however, the exhaustion doctrine may be bypassed where exhaustion will be futile or inadequate. Honig 484 U.S. at 326, 108 S.Ct. at 606.

Petitioner's situation is similar to the situation in the case of Manecke v. School Board of Pinilias County, 762 F.2d 912, 918 (11th Cir. 1985), cert. denied, 474 U.S. 1062, 106 S.Ct. 809, 88 L.Ed. 2d 784 (1986) in which the school board denied plaintiff access to the EHA's "carefully tailored administrative and judicial mechanism." The Court ruled in these circumstances, exhaustion of administrative remedies is not required before the district court may take action. Christopher W., 877 F.2d at 1095. Furthermore, in Kerr Center Parents Ass'n v. Charles, 897 F.2d 1463 (9th Cir. 1990), the Court ruled failure to exhaust administrative remedies was not a bar to the actions because resort to the administrative process would have been futile. In Kerr, parents of handicapped children instituted a Federal suit against the school district and individual administrators. The school district had refused to provide a due process hearing and stated they would no longer provide educational services because the

state had not appropriated sufficient funds. The Ninth Circuit held the plaintiffs were not required to exhaust their administrative remedies because they had already taken all the measures to secure administrative relief which could reasonably be expected of them, and the state had determined it would not provide the funds necessary for plaintiffs' free appropriate education. Id. at 1470. These cases clearly indicate the district court has jurisdiction in cases where the administrative agency will not abide by the guidelines for reinstatement of an individual's firearms rights. Due to the ATF's inability to process Petitioner's Application for Removal of Federal Firearms Disabilities (hereinafter referred to as "Petitioner's Application"), the ATF is denying Mr. McGill access to the administrative mechanism. Both the Fifth Circuit and the Supreme Court have held the exhaustion doctrine does not apply in cases where it would be futile to use the due process procedure or when the due process procedure has been denied. Christopher W., 877 F.2d at 1094, Hessbrook 777 F.2d at 1003, Honig 484 U.S. at 326, 108 S.Ct. at 606. In these instances, the district court may take action.

It is clear from Respondent's Brief that the ATF is statutorily forbidden from taking any action on Petitioner's Application; and therefore, the ATF no longer has the authority to make a ruling on Petitioner's Application. By arguing that the ATF cannot take action, Respondent admits that the district court should have jurisdiction to rule on Petitioner's Application for the following reasons:

1. It would be patently futile for Petitioner to continue pursuing his administrative remedies because the ATF will not review his application; and

2. It is improbable that adequate relief can be obtained by pursuing administrative remedies because the hearing officer lacks the authority to grant the relief sought.

Both of the above arguments are exceptions to the exhaustion doctrine. Christopher W., 877 F.2d at 1094, Hessbrook 777 F.2d at 1003, Honig 484 U.S. at 326, 108 S.Ct. at 606.

Respondent contends (Resp. 7) that "Even if ATF's refusal to process petitioner's application were treated as a denial, it would not assist petitioner." However, Petitioner is not arguing that the ATF has denied Petitioner's Application. Instead, Petitioner is arguing that it would be patently futile for Petitioner to continue to apply to the ATF to have his Federal firearms disabilities removed because the ATF lacks the authority to grant the relief, and therefore, it is improbable that adequate relief can be obtained by further pursuing Petitioner's administrative remedies.

Respondent further contends (Resp. 10) that since this issue is pending in a number of other cases across the country, this case and the Rice v. United States, 402 U.S. 479, 91 S.Ct. 1565, 29 L.Ed.2d 47 (1971) opinion does not warrant this Court's review. However, the fact that other cases are pending on this issue is the very reason that this Court should review this case and the Rice case. By doing so, this Court can make a clear and decisive ruling on whether the district court has jurisdiction to rule on an individual's application for removal of Federal firearms disabilities.

Respondent also states (Resp. 10-11) that it believes the other appellate courts will agree with the Fifth Circuit's decision in this case and that a consensus in the court of appeals may emerge. But, the other appellate courts may just as well agree with the Third Circuit's decision in the Rice case. No matter how the other appellate courts rule, there will still exist a conflict in the circuits. And although a consensus may emerge, a clear and decisive ruling by the Supreme Court will be the quickest and most effective method to resolve any conflicts between the circuit courts.

Moreover, Respondent states (Resp. 11) that "the decision in the Rice case has not had significant consequences thus far." This argument only shows the Court that any fear of an onslaught of cases being filed with the district courts by individual's seeking to have their Federal firearms disabilities removed is completely unfounded.

As stated before, this case presents an excellent opportunity for this Court to make a clear, decisive and final determination of whether Public Law 102-393 makes an individual's application to the Bureau of Alcohol, Tobacco and Firearms futile since the ATF no longer has the authority to rule on an individual's application to remove Federal firearms disabilities such that the individual is no longer under the exhaustion of administrative remedies doctrine and may seek relief directly in the district court.

CONCLUSION

For the foregoing reasons, Petitioner, Kenneth W. McGill, respectfully requests this Court to grant his

petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit.

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